

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA

Case No. 1:11-mj-82

-v-

Grand Rapids, Michigan
September 28, 2011
10:25 a.m.

REED STANLEY BERRY,

Defendant.

HON. ROBERT HOLMES BELL

PRELIMINARY HEARING AND DETENTION HEARING
BEFORE THE HONORABLE HUGH W. BRENNEMAN, JR.
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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I N D E X

WITNESSES - GOVERNMENT:

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WITNESSES - DEFENDANT:

None

EXHIBITS

IDENTIFIED

None

1 Grand Rapids, Michigan

2 Wednesday, September 28, 2011 - 10:25 a.m.

3 THE COURT: The next matter is the United States
4 versus Reed Stanley Berry in 1:11-mj-82. We are scheduled for a
5 preliminary hearing at this time as well as a detention hearing.

6 Defendant is present with counsel. Are the parties
7 ready to proceed?

8 MR. FRANK: The government is, your Honor.

9 MR. MUAWAD: Defense is, your Honor.

10 THE COURT: All right. Fine.

11 Are we going to have the hearings on both of these
12 matters and, if so, can we take testimony simultaneously?

13 MR. MUAWAD: Your Honor, the preliminary hearing,
14 we're going to waive that.

15 THE COURT: Okay.

16 MR. MUAWAD: I know that the issue really is
17 detention but I've talked to my client and we're going to waive
18 the preliminary hearing but the issue of detention is the one
19 we'd like some testimony on.

20 THE COURT: All right.

21 Mr. Berry, do you understand your right to have a
22 preliminary hearing to determine probable cause in this matter?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: You've had a chance to talk to your
25 attorney about this?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: That's fine. And you are waiving or
3 giving up your right to the preliminary hearing at this time; is
4 that correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Anybody threaten you or use any force or
7 duress or undue pressure or anything of that nature to make you
8 give up your right to the preliminary hearing?

9 THE DEFENDANT: No, sir.

10 THE COURT: All right. Then I find that you know
11 what you're doing and that you are doing it voluntarily and the
12 matter will be referred to the -- remain outstanding until the
13 grand jury has a chance to consider it.

14 That leaves us with a detention hearing. Please be
15 seated and we'll proceed with that at this time, and the
16 government may go ahead.

17 MR. FRANK: Thank you, your Honor.

18 And because obviously the weight of the evidence on
19 the underlying count or underlying charge is something the Court
20 considers on the issue of detention, although I appreciate the
21 defense waiving the preliminary hearing I'm still going to go
22 ahead and call two witnesses and put a fair amount of testimony
23 in front of the Court as it pertains to detention.

24 Government calls Special agent Chris Hess, FBI.

25 CHRIS HESS, GOVERNMENT WITNESS, SWORN

DIRECT EXAMINATION

BY MR. FRANK:

Q You're a special agent with the FBI?

A That is correct.

Q How long have you been with the bureau?

A Approximately eight years.

Q Where are you assigned right now?

A I'm out of the Detroit FBI office but I'm assigned to the Kalamazoo Resident Agency.

Q Before joining the FBI, did you have some law enforcement experience?

A Yes, I did. I was a police officer in Pennsylvania for approximately five years.

Q And as part of your -- or rather in the performance of your duties did you become familiar with the name Reed Stanley Berry by December of 2009?

A That's correct, I did.

The investigation began around the approximate time of December 2009 during which time a CNN news story ran regarding the increasing and ongoing problem of online or internet Islamic extremists being used as a way to recruit, promote, and distribute terrorist organization's media.

Q How did that CNN story involve or rather draw the FBI's attention to Mr. Berry, if at all?

A During the CNN news story a particular user name that Mr.

1 Berry utilized was, in fact, highlighted, and it did show during
2 the broadcast that that particular user name was broadcasting
3 violent Jihadi videos that depicted violent attacks on what
4 appear to be US forces overseas.

5 Q So then as a result or rather at least partially as a
6 result of this CNN story the FBI's attention was drawn to Mr.
7 Berry?

8 A That is correct.

9 Q During the course of the investigation what sort of
10 criminal investigative techniques were employed?

11 A The extensive investigation resulted in a culmination of
12 numerous criminal investigative techniques to include but not
13 limited to sources, undercovers, interviews of other FBI counter
14 terrorism subjects, physical surveillance, and search warrants.

15 Q These interviews of other subjects, are these other
16 subjects within the United States?

17 A That is correct, other FBI divisions.

18 Q And who were some of these people?

19 A Other subjects such as Emerson Begolly and --

20 Q And can you spell his name for the court reporter?

21 A Emerson, E-m-e-r-s-o-n, last name Begolly, B-e-g-o-l-l-y.

22 Q And where was he located?

23 A He was actually located in the Western District of
24 Pennsylvania but was indicted recently for terrorism charges in
25 the Eastern District of Virginia.

1 Q Okay. Any other named investigative subjects?

2 A Yes. For instance, another indicted individual would be
3 Zachary Chesser, first name --

4 Q Common spelling on Zachary?

5 A That's correct.

6 Q And how's he spell Chesser?

7 A C-h-e-s-s-e-r.

8 Q Okay. And what's his status right now?

9 A He was also indicted in the Eastern District of Virginia on
10 terrorism charges.

11 Q And during the course of the investigation did one or both
12 of these people sit down and talk with the FBI about Mr. Berry?

13 A That is correct, they both did, and both acknowledged their
14 close association with Mr. Berry as well as acknowledged the fact
15 that he was a prolific participant and contributor to numerous
16 Islamic Jihadi media websites and web forums.

17 Q And then you also mentioned a couple of search warrants.
18 Those were search warrants issued by this Court?

19 A That is correct. The first one took place on March 9th,
20 2011, when a search was conducted of Mr. Berry's residence at
21 4603 Terra Lane in St. Joseph, Michigan.

22 Q And that search warrant was issued based on a demonstration
23 of probable cause of what?

24 A Based on probable cause that Mr. Berry was, in fact,
25 involved in subtitling efforts on behalf of terrorist

1 organizations and also web forums and websites that act as
2 conduits for those organizations to promote and distribute those
3 Jihadi media and propaganda.

4 Q And did the execution of that search warrant -- which I
5 believe you said was in March of 2011 --

6 A That's correct.

7 Q -- did the execution of that search warrant result in the
8 seizure of digital media?

9 A Yes, it did. It resulted in a significant seizure, a large
10 volume of digital media from Mr. Berry's residence.

11 Q And so when we say "digital media," we're talking about --

12 A Computer media.

13 Q So hard drives, collateral, peripheral devices --

14 A That's correct.

15 Q -- all that sort of thing?

16 A That's correct, yes.

17 Q And then the second search warrant, what was that for and
18 when was it issued?

19 A The second search warrant was issued by Western District of
20 Michigan in May of 2011, and that was to Yahoo in order to obtain
21 digital media from Yahoo regarding Mr. Berry's Yahoo account.

22 Q And did Yahoo comply with that search warrant in a timely
23 manner?

24 A Yes, it did. And it also resulted in a significant volume
25 of digital media.

1 Q So what did the FBI do with all of this media that had been
2 seized from Mr. Berry's residence and that had also been provided
3 by Yahoo?

4 A The FBI appropriately forwarded the digital media to the
5 FBI Detroit division where it was forensically exploited and
6 analyzed by the computer people at the FBI.

7 Q And without going into too great a detail what did the
8 result of those forensics examinations indicate?

9 A The results of those examinations did indicate that Mr.
10 Berry was, in fact, involved in Jihadi websites, web forums, was
11 a prolific and a contributor and participant in those websites,
12 and also spent significant efforts in subtitling Jihadi videos on
13 behalf of terrorist organizations and terrorist websites.

14 Q When you say "terrorist organizations," are you talking
15 about organizations that include those that have been designated
16 by the US government as foreign terrorist organizations?

17 A That is correct.

18 Q And did the examination of the media, the digital
19 information, both stuff that came out of Mr. Berry's residence
20 and the stuff that was provided by Yahoo, did that result in the
21 acquisition or discovery of significant communications between
22 online communications between Mr. Berry and the subjects of these
23 other investigations?

24 A Yes, it did.

25 Q You'd already mentioned Begolly and Chesser. Was Mr. Berry

1 in communication with any other subjects of FBI investigations in
2 this support of foreign terrorist organizations arena?

3 A He was in contact with an individual from the FBI Baltimore
4 division. He is a minor but he is -- he was arrested for
5 terrorism-related charges.

6 Q And what's his status, this other individual, with respect
7 to his case right now?

8 A He was indicted for terrorism related charges. He is in
9 the process of possibly being transferred to adult status for
10 those charges.

11 Q And for that reason his name has not been publicly
12 disclosed in a public forum?

13 A That is correct.

14 Q And then how about somebody known in the media as Jihad
15 Jane from Philadelphia?

16 A We have investigative results that have determined that, in
17 fact, Mr. Berry was in communication with that individual via a
18 web forum known for Jihadi media.

19 Q Now, back in March of 2011 when the search warrant was
20 executed, did Mr. Berry become aware of the investigation that
21 had been ongoing since December of 2009?

22 A Yes, he was made aware. As a matter of fact, he was
23 interviewed simultaneously by myself and another special agent.

24 Q And in the course of that investigation you explained or
25 gave him some background on why you all had searched his house?

1 A That's correct.

2 Q Was he also provided with a copy of the search warrant
3 affidavit?

4 A Yes, he was. His defense counsel was given a copy at that
5 time.

6 Q And that was an attorney other than Mr. Muawad, correct?

7 A That's correct.

8 Q Did Mr. Berry -- during your interview with him -- by the
9 way, was that a custodial interview?

10 A No, it was not. It was located at the Berrien County
11 Parole Office. Prior to speaking with him we notified Mr. Berry
12 that he was -- if he did not want to speak with us we would
13 leave.

14 Q But he went ahead and spoke with you?

15 A That's correct.

16 Q And without going -- again, keeping this fairly general
17 because this is all background on the issue of detention --
18 keeping it fairly general, did he make incriminating statements
19 during that interview?

20 A He did, in fact, explain that he was involved in
21 manipulating Jihadi videos and subtitling -- English subtitling
22 efforts, yes.

23 Q Did he make some disclaimer, if you will, about his
24 contacts with or his contacts with foreign terrorist
25 organizations?

1 MR. MUAWAD: My only objection is it hasn't been
2 determined in the past with the names that have been mentioned
3 that they have contacts with foreign terrorism or organization.
4 He's mentioned three individuals, two adults and a minor, no
5 organizations.

6 So my objection is I don't mind him answering the
7 question but I'm asking to see if there was any contacts with
8 organizations in order for that question to be answered because
9 the three individuals do not show any contacts to organizations.

10 THE COURT: I didn't understand that, if that's an
11 objection to the question or not. It sounds like you objected
12 and then said you don't mind him answering the question.

13 MR. MUAWAD: Well, there was nothing in the evidence.
14 He asked him a question about past organizations or statements
15 made by client about past terroristic organizations. There's
16 nothing so far that the FBI agent has testified to regarding
17 that.

18 I don't mind him asking questions pertaining to if
19 he's contacted any prior organizations, not individuals, but as
20 far as the question is concerned because there's no foundation as
21 to whether or not terrorism organizations are involved, and I
22 don't think he can answer it. That's all.

23 MR. FRANK: I believe the agent's testimony was that
24 the forensic examination of the seized media indicated that he
25 had been actively supporting these organizations.

1 THE COURT: Go ahead and ask the question again.

2 BY MR. FRANK:

3 Q Although he made admissions about -- partial admissions
4 about some of the activity he had been up to, did Mr. Berry make
5 some disclaimer about having been in contact or having done
6 anything intentionally on behalf of foreign terrorist
7 organizations?

8 A He mentioned that, yes, in fact, he was involved in the
9 English subtitling efforts but that he did not do that those
10 efforts on behalf of any particular organization; he did it on
11 his own.

12 Q Now, the activity, what was Mr. Berry's status with respect
13 to the State of Michigan while he was engaged in the activity
14 that the FBI was investigating?

15 A Mr. Berry at that point in time was on parole. He was not
16 incarcerated previous to that. But on March 9th as a result of
17 the investigative activity by the FBI the Berrien County Parole
18 Office did violate his status.

19 Q And what role, if any -- I mean, what role, if any, did the
20 FBI play in, other than its investigation, play in that decision
21 by the State of Michigan?

22 A The FBI had no role whatsoever. We made it very clear
23 numerous times to the Berrien County parole personnel that, yes,
24 there was an ongoing investigation but whether or not they
25 decided to violate his parole status was completely up to them.

1 Q So then as the weekend of 11 September of this year
2 approached what was the FBI's investigative status with respect
3 to Mr. Berry?

4 A Obviously over the 9/11 weekend there was an increased
5 security posture around the nation. FBI headquarters required us
6 to conduct 24/7 surveillance on Mr. Berry during that weekend.

7 Q And so that underlying investigation was still very active?

8 A That's correct.

9 Q Was there a specific operational plan developed here
10 locally with the FBI for the surveillance of Mr. Berry over the
11 9/11 weekend?

12 A Yes, there was, as is the normal course of procedure for a
13 surveillance operation such as this, an operational plan was
14 drafted and put into place.

15 Q What were the basic parameters of that operation plan?

16 A The parameters of our surveillance units were to, in fact,
17 surveill him and nothing more. As a matter of fact, it was
18 briefed to the surveillance units that we were to avoid any
19 confrontation with Mr. Berry at all costs. However, if a
20 surveillance unit was absolutely unable to get out of a
21 particular situation then Mr. Berry would be addressed
22 accordingly.

23 Q When did that surveillance actually start?

24 A Began on September 9th, 2011.

25 Q What day of the week was that?

1 A That was a Friday.

2 Q And how were the -- how was the manning, if you will, of
3 the surveillance going to be conducted?

4 A The manning as far as the shifts go were 12-hour shifts and
5 they ran from eight to eight. In other words, Detroit FBI
6 personnel would take the 8:00 a.m. to 8:00 p.m. shift and then
7 the Grand Rapids personnel or the west side of the state, so to
8 speak, would take the 8:00 p.m. to 8:00 a.m. shifts.

9 Q So then at eight o'clock in the morning on Friday the 9th
10 Detroit personnel started surveilling Mr. Berry?

11 A That is correct.

12 Q Were you given regular reports of how the surveillance was
13 going during the day on Friday?

14 A Yes, I was, towards, I believe, the latter portion of the
15 day as well as through the evening of September 9th I was given
16 notifications via cell phone as to what had occurred.

17 Q And were you yourself going to be responsible for one of
18 these night time surveillance shifts?

19 A That is correct. I was responsible for the September 10th
20 shift, 8:00 p.m. through the September 11th 8:00 a.m. shift.

21 Q So Saturday night to Sunday morning?

22 A That's correct.

23 Q And was a Special Agent Sam Moore also assigned one of
24 these shifts?

25 A That is correct. He was assigned the night of the 9th of

1 September through the morning of September 10th.

2 Q Friday night to Saturday morning?

3 A That's correct.

4 Q And was there a task force officer named Larry Dyksterhouse
5 assigned?

6 A Yes, there was, to the same shift as Sam Moore.

7 Q All right. What kind of reports did you get from the
8 Friday day shift about what Mr. Berry was doing?

9 A It was reported to me in general terms that Mr. Berry on
10 several occasions had attempted to approach, aggressively
11 approach surveillance units at which time they broke contact and
12 to avoid a confrontation.

13 Q And by "aggressively approach," what was described to you
14 in these contemporaneous reports?

15 A I believe there was he would walk, you know, with a purpose
16 directly at the vehicles that the surveillance individuals were
17 driving sometimes yelling at them, that sort of thing.

18 Q Now, these vehicles, these units, can we assume they didn't
19 have like FBI emblazoned on the side of the vehicles?

20 A That's correct. They're unmarked, normal, plain-looking
21 vehicles.

22 Q And the agents doing the surveillance weren't wearing any
23 FBI markings?

24 A That's correct.

25 Q During your shift, which would be the Saturday night to

1 Sunday morning shift, did you yourself have an incident with Mr.
2 Berry?

3 A Yes, I did.

4 Q Would you describe that to the Court?

5 A Yes, I will. Approximately 2130 hours or 9:30 p.m. on
6 Saturday night, which would be September 10th, it was myself and
7 two other special agents as well as a task force officer from
8 Benton Township Police Department that were conducting the
9 surveillance.

10 At that approximate time surveillance units visually
11 observed a maroon Ford Taurus back out of the driveway of the
12 residence known to be where Mr. Berry resided at 4603 Terra Lane.

13 Q Then what happened?

14 A Surveillance units observed from a distance as Mr. Berry or
15 the maroon Ford Taurus left the neighborhood and traveled east on
16 Marquette Woods Road and then he went to the intersection of
17 Scottsdale Road and made a left hand turn and traveled north on
18 Scottsdale Road.

19 Q And when did you yourself pick up Mr. Berry?

20 A I believe it was immediately upon his making a left hand
21 turn on Scottsdale Road and heading north. I was traveling
22 behind him at a distance and observed him travel to the next
23 intersection which was the intersection of Scottsdale Road and M-
24 139.

25 Q Then what happened?

1 A The maroon Ford Taurus made a left hand turn on M-139 and
2 traveled north towards the I-94 area and Benton Harbor.

3 From there surveillance units observed him from a
4 distance. At certain points on M-139 traveling north he would
5 travel at a high rate of speed, at one particular instance so
6 much so that we temporarily lost sight of Mr. Berry after he
7 turned into what appeared to be a residential area of Benton
8 Harbor.

9 Q But you re-acquired him shortly after that?

10 A Yes, that's correct, based on earlier reports and earlier
11 locations that Mr. Berry had frequented. There was a location at
12 817 Thresher Avenue that we did do a drive-by shortly thereafter
13 and surveillance units actually observed the maroon Ford Taurus
14 parked unoccupied at that location.

15 Q So then is it safe to assume that you and the other unit
16 parked somewhere on the street to keep an eye on that vehicle?

17 A That is correct. The other two special agents
18 strategically located themselves in positions where they could
19 possibly observe Mr. Berry traveling back to his residence.

20 Myself and a task force officer, because of the fact
21 there was a lot of foot traffic in the area, we decided to park
22 west of that location on Thresher Avenue. I was parked on the
23 north side of the road facing west and the task force officer was
24 parked on the south side of Thresher facing east, essentially
25 right across the street from each other facing opposite

1 directions.

2 Q And this is about 9:30-10:00 at night?

3 A That's correct.

4 Q Did you and the other surveilling officer see Mr. Berry
5 shortly after that?

6 A Yes, we did. Shortly thereafter the task force officer
7 advised that he observed Mr. Berry and two unidentified
8 individuals exit the address I mentioned previously.

9 The two unidentified individuals got into a small,
10 light-colored sedan and immediately traveled out of the parking
11 lot, which essentially was a vacant lot, with their high beams on
12 and stopped directly in front of the task force officer
13 illuminating him as he sat parked on the side of the roadway.

14 Q Okay. Then what?

15 A Immediately thereafter Mr. Berry was observed walking
16 around the rear of the small, light-colored sedan and was
17 approaching the task force officer's driver's door area. At that
18 point the task force officer decided to turn his lights on and
19 sped in an easterly direction on Thresher in order to avoid a
20 confrontation.

21 Q Then what did you do?

22 A Shortly thereafter, or immediately thereafter, rather, the
23 small white sedan traveled in a westerly direction past me on my
24 left and traveled at a high rate of speed to the next
25 intersection and conducted like a hasty U-turn and then began

1 traveling back towards me with their high beams on and again
2 illuminating me as I sat on the side of the roadway.

3 Q Did you see Mr. Berry at about that time?

4 A I did. I quickly glanced in my left hand rear view mirror
5 and I saw Mr. Berry standing in the middle of Thresher Avenue
6 kind of taking notice to what the small sedan was doing, and when
7 he noticed what was going on he started to take steps in my
8 direction.

9 Q And what did you do?

10 A At that point I made the decision to turn my headlights on
11 and get out of the area to avoid a confrontation.

12 Q All right. Let's jump forward to the latter part of just
13 this past week specifically 21 and 22 September which I believe
14 was a Wednesday and a Thursday. That prior weekend did the FBI
15 become aware of any indicators that Mr. Berry planned to travel?

16 A Yes. I believe the week prior we had been notified by FBI
17 decoders that he did, in fact, or he was, in fact, issued a US
18 passport, so indications were that he possibly was planning on
19 traveling overseas in the near future.

20 Q And then some days after that was the FBI given any
21 notification about airline travel?

22 A Yes, we were. I believe it was on or about the 19th of
23 September the FBI again notified me as to Mr. Berry's travel
24 plans that were to leave out of Midway Airport on the 22nd of
25 September and transit through Detroit and then arrive, the

1 ultimate destination would be Heathrow Airport in London.

2 Q Did you and your supervisory agent and I sit down and have
3 a conversation about how to handle this information and what to
4 do with it?

5 A Yes, sir, we did. Matter of fact, we through that
6 coordination it was determined at that time that once we
7 confirmed that Mr. Berry was, in fact, at his residence on Terra
8 Lane that you, Mr. Frank, would make a telephone call out of
9 courtesy to his defense counsel and inform him of not only the
10 travel plans but also that Mr. Berry was on a "no fly" list.

11 Q Just for the sake of the record, the "no fly" list, what
12 effect does that have on a person's ability to travel by air in
13 the United States, in or from the United States?

14 A An individual being on the "no fly" list it means that he's
15 not going to fly on an aircraft or get on any aircraft in the
16 United States.

17 Q So, plain and simple, that's a show stopper?

18 A That's correct.

19 Q Is that something that an individual is informed of, the
20 fact that they've been placed on the list, are they informed of
21 that at any time prior to actually trying to travel?

22 A No, not necessarily, no.

23 Q Well, usually?

24 A Usually, no.

25 Q Was Mr. Berry, prior to my telephone call to Mr. Muawad, to

1 your knowledge was Mr. Berry informed that he was on the "no fly"
2 list?

3 A No, he was not.

4 Q And, incidentally, as a result of this information the fact
5 that the State Department had issued him a passport and the fact
6 that he had travel reservations out of the country, as a result
7 of that what did the FBI do with respect to the surveillance?

8 A The FBI on the morning of the 22nd of September we did
9 confirm that Mr. Berry was, in fact, at home.

10 Q What I mean, though, is there a break in surveillance
11 between the weekend of September 11th and this time period of 21-
12 22 September?

13 A Yes. Yes, as a matter of fact, there was, yes.

14 Q Okay. So then as a result of the information that he'd
15 planned to fly and that he had a passport, was surveillance
16 reinstituted?

17 A Yes, it was.

18 Q So I think you said it was on a Wednesday that the decision
19 was made to place a courtesy call to Mr. Muawad telling him about
20 the "no fly" list and the travel plans?

21 A That's correct.

22 Q What happened with respect to surveillance Wednesday night
23 of last week?

24 A Wednesday night, I believe it was the 21st of September,
25 the visual surveillance observed Mr. Berry open the rear of the

1 maroon Ford Taurus and place what appeared to be some sort of
2 luggage item in the trunk of the car.

3 Q And was it possible to maintain surveillance of Mr. Berry
4 all through Wednesday night into Thursday morning?

5 A It was possible but I believe through Wednesday night there
6 was a point in time when surveillance units did lose contact with
7 him.

8 Q When did the -- and you might have already testified to
9 this but, if so, please just do it again. When did the FBI
10 reacquire Mr. Berry? When was the FBI certain that they had him
11 in sight again?

12 A I believe it was -- it was the morning of the 22nd which
13 was the day that Mr. Berry was scheduled to fly. I believe it
14 was about 0900 approximately. All surveillance units did, in
15 fact, confirm that Mr. Berry was located at his residence.

16 Q What time was he due to leave, I believe you said it was
17 Midway in Chicago?

18 A The flight was scheduled for approximately 1340 hours so
19 that would have been 1:40 in the afternoon.

20 Q And were you present when the call was placed to Mr. Muawad
21 to tell him about this?

22 A Yes, I was. Myself and you, Mr. Frank, were located in
23 Washington, DC, on business. I was present when you made the
24 initial call to the defense counsel and left a voice mail giving
25 him the information regarding not only the travel plans but also

1 Mr. Berry being on the "no fly" list.

2 Q And were you present when Mr. Muawad called me back?

3 A Yes, I was. And, Mr. Frank, you indicated that Mr. Muawad
4 was the person to call and as a matter of fact advised that he
5 would reach out to Mr. Berry and pass on the message that he was,
6 in fact, on a "no fly" list and was most likely not going to fly
7 that day.

8 Q Did Mr. Berry actually leave his home then after that and
9 go to Midway?

10 A No, he did not.

11 Q Were you one of the arresting officers just this past
12 Friday --

13 A Yes.

14 Q -- of Mr. Berry on the criminal complaint that's in front
15 of the Court now?

16 A Yes, I was.

17 Q After he was arrested did you give Mr. Berry the
18 appropriate Miranda warnings?

19 A Yes, I did.

20 Q Did he go ahead and talk to you?

21 A Yes, he did. After reviewing the FD-395 Advice of Rights
22 Form several times and going at length to make sure he understood
23 it, he made the decision to sign the form indicating that he
24 understood his rights and was willing to talk to us and answer
25 some questions.

1 Q In that conversation did he make clear, if at all, that he
2 knew what the underlying investigation was about?

3 A We explained it to him, and upon hearing about what the
4 warrant was all about it appeared that Mr. Berry became somewhat
5 irritated and he said he didn't recall ever doing anything like
6 that that resulted in his arrest.

7 Q But in your conversation with him -- where was he arrested?

8 A He was arrested at an intersection, Hollywood and Maiden in
9 St. Joe.

10 Q St. Joseph, Michigan?

11 A Yes.

12 Q And that's about how far from the courthouse here?

13 A I think it's a little more than an hour drive, maybe hour-
14 and-a-half.

15 Q All right. Was he fairly -- was he talking most of that
16 hour?

17 A Yes, he was.

18 Q In that conversation though did you touch on the underlying
19 investigation for his internet activities?

20 A Yes, we did.

21 Q And how familiar did he seem to be about the substance of
22 that investigation?

23 A He initially started saying that we --

24 Q All right. We don't need to go into detail about what he
25 said --

1 A Yes, sir.

2 Q -- about that other activity, but what I'm after is how
3 familiar was he with the substance of that other investigation?

4 A He was familiar with it because he had access to the
5 original affidavits for the earlier search warrants.

6 Q Did he say anything about going back to that weekend of
7 9/11. What, if anything, did he say about his knowledge
8 regarding the FBI surveillance?

9 A When we initially said that the arrest warrant was as a
10 result of the, you know, backing up and towards the surveillance
11 agent, he said he doesn't recall backing up towards anyone. If
12 he knew it was an FBI agent he wouldn't have done so.

13 THE COURT: He would or would not have done so?

14 THE WITNESS: He would not have done so. I'm sorry.

15 But then as the conversation went on Mr. Berry
16 appeared to be getting more and more irritated and said, "You
17 guys suck at your job."

18 BY MR. FRANK:

19 Q That's a direct quote?

20 A Yes.

21 Q All right. Then what else did he say?

22 A He said I knew it was you guys, I knew it was the FBI, you
23 all look the same. I would take ambiguous turns. You guys would
24 follow me. I'd take a weird shortcut through a parking lot to
25 get somewhere. You guys would follow me, et cetera.

1 Q Did you talk to him about this international travel, this
2 flight to England that he had booked for Thursday, 22 September?

3 A Yes, sir, we did.

4 Q What did he say about that?

5 A When asked if he had a return flight or any intention of
6 returning to the United States he said, no, I had no intention of
7 returning to this country.

8 Matter of fact, he said he wanted to just be with his
9 wife who is located in London, wanted to raise a family, wanted
10 to support them, possibly work, possibly become a student, and
11 through his wife possibly become a UK citizen.

12 Q Through grand jury process did the FBI obtain the flight
13 records or rather the itinerary records related to that UK
14 flight?

15 A Yes, we did, from Delta Airlines.

16 Q And, in fact, that indicated that it was not a one-way trip
17 though, didn't it?

18 A That is correct, it indicated that it was a round-trip
19 ticket.

20 Q But he told you what about what he intended?

21 A He said he had no intention of ever returning to the US.

22 Q You mentioned that you and I were in DC when the call was
23 placed to Mr. Muawad?

24 A Yes, sir.

25 Q Did that involve sitting down and talking with this Emerson

1 Begolly from Pittsburgh?

2 A Yes, it did, about that same exact time as a matter of
3 fact.

4 Q And what did Mr. Begolly say about his online associations
5 with Mr. Berry?

6 A Mr. Begolly indicated that they had a close online
7 association. They spoke regularly. And Mr. Begolly indicated
8 that Mr. Berry was well known and respected through online
9 internet Jihadi circles.

10 Q And what did he say about Mr. Berry's activity with respect
11 to this subtitle to work on the videos?

12 A Mr. Begolly indicated that Mr. Berry was well known and
13 respected for his subtitling efforts. As a matter of fact, he
14 was wished well by other online individuals after he would
15 complete a subtitling project.

16 Q What did Mr. Begolly say about Mr. Berry's knowledge about
17 the organizations that he was supporting or attempting to
18 support?

19 A Mr. Begolly advised that it was known, that it was known by
20 everybody including Mr. Berry who these -- who these
21 organizations were and what they stood for.

22 Q And, incidentally, this online activity, are these like
23 open forums? I mean, is this something I can -- a forum I can
24 just Google and go jump on myself?

25 A Many of them -- many of them are not. Some of them are by

1 invite only or password protected.

2 Q Did Mr. Begolly disclose any communication with Mr. Berry
3 about Mr. Berry wanting to leave the country?

4 A Yes. Mr. Begolly indicated at one point in time Mr. Berry
5 said to him that he wanted to travel to Somalia to go on vacation
6 and afterwards he made the "wink" symbol with the semicolon and
7 the parenthesis.

8 Q As an FBI agent familiar with investigations of foreign
9 terrorist organizations, did this reference to going to Somalia
10 on vacation, wink, wink, did that mean anything in particular to
11 you or indicate anything special to you?

12 A Yes, it did. As a matter of fact, when Mr. Begolly was
13 asked what did Mr. Berry mean by the wink, he said, well,
14 indicated he wasn't going to Somalia on vacation. And in
15 addition in my experience going to Somalia could possibly mean
16 going to participate in Jihad.

17 Q Well, what's significant about Somalia, I guess that's my
18 question, other than maybe it's not the greatest vacation place
19 in the world?

20 A Somalia is the known location of the al-Qaeda associated
21 group al-Shabaab.

22 MR. FRANK: Nothing further, your Honor.

23 THE COURT: Thank you.

24 Cross-examination?

25 MR. MUAWAD: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. MUAWAD:

Q Agent Hess, regarding the -- they kind of jumble around a little bit -- but regarding the questioning in your vehicle from the time you arrested him to the travel into Grand Rapids, you had given him his Miranda rights, correct, under your FBI form?

A Yes, we did.

Q And you asked him some questions about travel; would that be correct?

A Yes, we did.

Q And your understanding, if I'm correct, is he does have a religious wife, maybe not a wife that he married through a judge or through a priest, but a religious wife in England, correct?

A Correct.

Q You know her name, correct?

A I do, yes.

Q That's in your report, a report that I've seen the name of the young lady in England?

A I believe it may be, yes.

Q All right. And he was actually traveling to go be with his wife; that's what he told you -- Mr. Reed -- correct?

A That was, yes, that was what he desired to do.

Q Right. He never said to you, look, I'm leaving because I'm running away from any criminal troubles I may have, or I'm running away from the FBI. He emphatically told you that he was

1 leaving to England to be with his wife and maybe start a new life
2 with her if he could, correct?

3 A That is correct.

4 Q All right. Now, Mr. Berry did know about the investigation
5 into alleged allegations or allegations of terrorism, right,
6 before he was arrested?

7 A That's correct.

8 Q All right. And prior to getting his air flight or during
9 the passport process there has been no indictments as you know of
10 for material support to a terroristic group, correct?

11 A On Mr. Berry or --

12 Q Right, Mr. Berry?

13 A That's correct.

14 Q And no complaint filed, correct?

15 A That is correct.

16 Q And he was free to leave the United States? Other than the
17 "no-fly" zone he was free to leave the United States boundaries,
18 correct?

19 A That's correct.

20 Q And by way of background of Mr. Berry, he lives with his
21 father in St. Joseph, correct?

22 A Correct.

23 Q And his stepmother?

24 A Yes.

25 Q In fact, you had many conversations or some conversations

1 with his father about what's going on with Reed; am I correct?

2 A Other FBI agents had, yes.

3 Q Okay. I'm sorry. You have not but you're aware of
4 conversations that the FBI has had with his father in St. Joseph,
5 correct?

6 A That is correct.

7 Q Okay. Going to the beginning of the questioning from the
8 U.S. Attorney, did you personally see the CNN video? You saw
9 that personally?

10 A I have, yes.

11 Q And did you personally see Mr. Berry's -- what is it -- the
12 web, his e-mail or whatever you want to call it?

13 A User name.

14 Q User name?

15 A Yes.

16 Q You did. Okay. So you did not know at that point in time
17 that it was Mr. Berry, correct?

18 A I don't believe I did.

19 Q And was it when you were watching the CNN show was there
20 any connotation as to what that website or what that meant?

21 A The actual website that was shown?

22 Q Right.

23 A The news report indicated that it was, like I said, an
24 increasing and ongoing problem for law enforcement agencies
25 because the terrorist organizations were using these websites as

1 recruiting tools as a way or means to promote their Jihadi cause.

2 Q Right. Then for some reason CNN showed Mr. Berry's website
3 information or web information; would that be correct? If I'm
4 saying it wrong just let me know.

5 A It showed his user name and --

6 Q User name, correct.

7 A -- what was shown on his particular page.

8 Q But when they talked about or when it showed his user name
9 it didn't really have any specifics about what this user name was
10 doing other than the fact that they just showed the user name,
11 correct?

12 A And the video that was shown on his page.

13 Q All right. Is it fair to say that as we sit here today and
14 prior to Mr. Reed being arrested he's never traveled to Somalia,
15 correct?

16 A Correct.

17 Q He's never traveled to the middle east, correct?

18 A Not that I know of.

19 Q And he has not been associated with in Michigan and in
20 person I'm going to say, not on the computer, associated in
21 person with any known terroristic groups, correct?

22 A That is correct, in Michigan.

23 Q All right. Would you agree that Mr. Berry is kind of a
24 one-man show that what he's doing on the computer what he
25 believes or what you believe he's doing on the computer is just

1 Mr. Berry; that there's no conspiracy with anybody else?

2 A I would believe that Mr. Berry is doing what he's doing for
3 various reasons although he has online contacts that are involved
4 in similar activity.

5 Q Right. And without getting too much into, you know, the
6 legalities of it, he never went and trained at a paint ball
7 training for terrorism, correct?

8 A Not that I'm aware of, no.

9 Q You don't have him supplying any computers or formulas for
10 poison chemicals or anything like that to any known terrorist
11 groups, correct?

12 A Not that I'm aware of, no.

13 Q So what he's doing is he's on the computer pretty much a
14 closet computer guy and he's going into these portals or Jihad
15 websites; is that pretty much what he has here?

16 A That's correct.

17 Q And you can't comment as to whether or not he's protected
18 by the First Amendment on that or not protected or whether it's
19 material support or not material support, correct?

20 A Correct.

21 Q All right. The warrants, there were two warrants issued, I
22 believe one was for Yahoo accounts; am I correct?

23 A Yes.

24 Q And as we sit here today has there been any finalization or
25 determination from the Detroit FBI as to what all the Yahoo

1 messages or e-mails mean? Have you gotten a formal report from
2 them at all?

3 A The forensics are ongoing. I believe they're almost
4 complete.

5 Q And the first form was for his hard drive and his computer
6 and stuff like that?

7 A That's correct, yes.

8 Q Right. Has there been any formalization of what is in that
9 hard drive?

10 A Again, the forensics are ongoing.

11 Q Okay. And I believe Mr. Berry has been cooperative during
12 this whole investigation into possible terrorism issues, correct?

13 A Correct.

14 Q Other than the complaint, the allegations in the complaint?

15 A That is correct, yes.

16 Q I don't want to, you know, bypass that, but other than that
17 he's been pretty cooperative?

18 A With exception to the surveillance incidence, yes.

19 Q The surveillance incidence, okay. And really, you know,
20 he's talked to you either you or other agents, correct?

21 A On two occasions he's talked to me, yes.

22 Q Talked to you. You've been the only agent, okay. Then
23 obviously there's been some conversations with his father,
24 possibly his stepmother --

25 A Yes.

1 Q -- and some other agents?

2 A Yes.

3 Q Okay. All right. So as we sit here today there's really
4 been no determination as to really what the information means as
5 far as his ongoing on the computer; would that be correct?

6 A I'm sorry?

7 Q As far as we sit here today there's really been no
8 determination made either in the form of an indictment or a
9 complaint as to what exactly -- what Mr. Berry was doing was
10 illegal?

11 A The investigation is ongoing and, no, there has not been an
12 indictment thus far.

13 Q Okay. All right. On your ride back up from St. Joseph to
14 Grand Rapids when you were talking to him and you gave him his
15 Miranda rights, he pretty much as far as -- is it Begolly, am I
16 saying that right, Mr. Begolly?

17 A Emerson Begolly, yes.

18 Q He kind of thought he was a nut cake, right? Isn't that
19 what Mr. Berry said to you, he was a little nutty and --

20 A Yes, he said he was not -- wasn't normal.

21 Q Right. Wasn't normal and then --

22 THE COURT: I'm sorry, Counsel, could you clarify who
23 was saying what about whom?

24 MR. MUAWAD: Thank you, your Honor.

25 THE COURT: A lot of pronouns there but I need to --

1 MR. MUAWAD: No problem, Judge.

2 BY MR. MUAWAD:

3 Q During your ride up from St. Joseph to Grand Rapids and the
4 subject of Mr. Begolly came up, Mr. Berry had told you that he
5 thought Mr. Begolly was nutty or had some mental issues; am I
6 correct?

7 A I believe he said he was mentally unstable and he wasn't
8 normal.

9 Q Okay. And Mr. Begolly has been indicted in the district
10 federal court where he's at in Pennsylvania, if I'm correct,
11 western district?

12 A Eastern District of Virginia.

13 Q Oh, Eastern District of Virginia. And he sat down with you
14 and Mr. Hagen and talked to both of you; is that correct?

15 A That is correct.

16 Q Okay. And obviously in hopes of possibly getting maybe a
17 5K or a reduction in his sentence?

18 A I don't know.

19 Q Okay. All right. And you've also talked to another
20 person, am I correct, interviewed a minor or the minor was going
21 to possibly be charged as an adult?

22 A I haven't talked to him, no.

23 Q All right. Aside from Mr. Begolly who else has the FBI
24 talked to regarding Mr. Reed and Mr. Begolly?

25 A I mentioned Zachary Chesser.

1 Q And Zachary Chesser has been indicted, right?

2 A That's correct.

3 Q Regarding Begolly and Chesser, were they doing something
4 more than just talking on the internet, do you know? Do you know
5 what their charges are all about?

6 A Mr. Chesser was indicted for material support in that he
7 was planning on going to Somalia to participate with al-Shabaab.

8 Q So there was actually with Mr. Chesser a strong indication
9 that he was going to train in Somalia with a known terrorist
10 group?

11 A As far as I know about the case, yes.

12 Q Okay. And Mr. Begolly, what about him? What do you know
13 about the facts with him?

14 A Mr. Begolly was indicted for, I believe, posting an
15 explosives type manual online.

16 Q Right. He did something more affirmative such as posting
17 that manual for, I would take it, for terrorist groups, for
18 radicals --

19 A As far as I know about the case, yes.

20 Q Yeah, for radicals to look at, okay.

21 The issue of Mr. Reed going to Somalia, do you know
22 what time frame that was? Has it been recently that he was
23 talking about that? If it was years ago that Mr. Reed was
24 talking about potentially going to Somalia?

25 A I don't recall the date of the conversation, no.

1 Q The date of the conversation with Begolly?

2 A That's correct.

3 Q Okay. Was it within the last 12 months that you talked to
4 Mr. Begolly about Mr. Reed?

5 A No, I talked to Mr. Begolly --

6 Q Recently, right?

7 A -- recently, yes.

8 Q I'm sorry, I'm not making myself clear. Regarding the
9 conversation of Somalia and Mr. Reed --

10 A Yes.

11 Q -- do you know when Mr. Reed had said that to Mr. Begolly
12 or when that conversation took place?

13 A I can't recall when that conversation took place between
14 Mr. Berry and Mr. Begolly.

15 Q All right. And as far as you know as we sit here today
16 there was never any tickets purchased by Mr. Reed to Somalia,
17 correct?

18 A That's correct, as far as I know, yes.

19 Q All right. I don't have any more questions at this point.
20 Thank you, Agent.

21 A Thank you.

22 THE COURT: Fine. Thank you, Counsel.

23 Redirect?

24 MR. FRANK: Just a couple, your Honor.

25 REDIRECT EXAMINATION

1 BY MR. FRANK:

2 Q Mr. Muawad asked if you would agree that -- or rather if
3 you agreed that Mr. Berry had been cooperative with the FBI's
4 investigation, and you had previously testified that he admitted
5 some of the conduct that's under investigation.

6 Based on the arc, what the investigation has
7 disclosed to you thus far, do you believe that Mr. Berry had
8 admitted fully what he was involved in?

9 A No, I do not.

10 Q Mr. Muawad brought up the fact that there's been no
11 indictment on this other conduct yet. What were we in DC doing?
12 What was the main purpose of that meeting?

13 A Talking to the upper echelon Department of Justice and FBI
14 headquarters personnel about moving forward with the prosecution
15 on Mr. Berry.

16 Q Because in this sort of case does the U.S. Attorney need
17 approval from main justice to bring an indictment?

18 A According to what you've told me, yes.

19 Q And is that process ongoing?

20 A Yes, it is.

21 Q Mr. Muawad asked about Begolly and what Begolly was charged
22 with. Based on the investigation do you know whether Mr. Berry
23 was aware that Mr. Begolly had been arrested?

24 A Yes, I was aware that Mr. Berry was aware of the arrest,
25 yes.

1 Q Was Mr. Berry aware of the arrest of Chesser?

2 A Yes.

3 Q And how about Jihad Jane?

4 A Yes.

5 Q In any of the communications that came off of his computer,
6 what concern, if any, did he express about the fact that these
7 people had been getting arrested?

8 A I don't recall specifically at this time, however, he was
9 aware of the arrests.

10 Q Did he communicate with someone about the fact that one of
11 the people arrested was someone he'd been in direct contact with
12 and engaged in this kind of activity with?

13 A Yes, in fact, he said regarding Mr. Chesser he was the one
14 that initially invited Mr. Chesser to the Ansar forum.

15 Q The Ansar forum, that's the first mention of that.
16 Briefly, what is that?

17 A It's a Jihadi website, like I mentioned earlier, a meeting
18 place for like minded Islamic extremists around the world, and
19 sort of a conduit for terrorist media organizations to promote
20 and distribute their media and propaganda.

21 MR. FRANK: No further direct, your Honor.

22 MR. MUAWAD: No questions, your Honor.

23 THE COURT: All right.

24 May this witness be excused?

25 MR. FRANK: Yes, your Honor.

1 THE COURT: All right. Thank you.

2 THE WITNESS: Thank you, your Honor.

3 THE COURT: Please remain available.

4 MR. FRANK: Thank you.

5 The government calls Special Agent Sam Moore, FBI.

6 SAMUEL MOORE, GOVERNMENT'S WITNESS, SWORN

7 DIRECT EXAMINATION

8 BY MR. FRANK:

9 Q And you're assigned to the Grand Rapids Residence Agency of
10 the FBI's Detroit Division?

11 A That's correct.

12 Q How long have you been in Grand Rapids?

13 A Twelve years.

14 Q And how long have you been with the FBI?

15 A Twelve years.

16 Q Prior to the FBI did you have any law enforcement or
17 military experience?

18 A Yes. I was an Army officer, an infantry officer and then
19 intelligence officer on active duty in Germany and Desert Storm.

20 Q On the weekend of the 10th anniversary of September 11th,
21 2011, just a few weeks ago, were you assigned responsibilities to
22 surveill Mr. Reed Berry?

23 A Yes, I was.

24 Q What was the basic operational plan for that surveillance?

25 A We were to maintain constant surveillance of him even if it

1 meant being burned or if he caught onto the fact that we were
2 surveilling him and to not lose him, and also we were not
3 supposed to have any contact with him physically or any
4 interaction with him.

5 Q And I assume there was some briefing of all the agents who
6 were going to be involved in the surveillance over that weekend
7 before it commenced?

8 A That's correct. We had a meeting prior to it where we had
9 an operational plan briefing where it discussed the SOG, Special
10 Operations Group surveillance would be surveilling during the day
11 time hours. We would have the evening shift. And then the
12 shifts were broken down and who be covering that.

13 And during that time also the deadly force policy was
14 also read and gone over as part of the operation.

15 Q What does that mean, the "deadly force policy?"

16 A The deadly force policy for FBI agents is -- it states
17 under what circumstances we could use force that would be deadly
18 to another individual who's posing a threat to ourselves or other
19 agents or other individuals.

20 Q So these were the rules about when you can draw and use
21 your side arms, that sort of thing?

22 A That's correct.

23 Q As part of this briefing were you provided general
24 background about why you were being required to surveill Mr.
25 Berry?

1 A Yes. We were given a general overview that he's the
2 subject of a terrorism investigation for -- international
3 terrorism investigation and that who he came in contact, what he
4 was doing during the 9-11 weekend was of concern to the highest
5 level from our own headquarters, and that we also -- he had had
6 previous history of resisting and having contact with officers,
7 law enforcement officers.

8 Q So you were, at least in general terms, aware of his
9 criminal history?

10 A Generally, yes.

11 Q What shift were you assigned to for the surveillance?

12 A I was the eight p.m. to eight a.m. shift on the evening of
13 Friday the 9th of September.

14 Q Friday night to Saturday morning?

15 A That's correct.

16 Q And were you partnered with somebody for that surveillance?

17 A There were three other members on our team. There was
18 Agents Christina Kleinpaste, Dave Smith, and then Task Force
19 Officer Larry Dyksterhouse. He's a Michigan State Police
20 Detective-Sergeant who's assigned to the Joint Terrorism Task
21 Force.

22 Q And how long have you and Agent -- well, we'll call him
23 Sergeant Dyksterhouse been working together?

24 A Approximately eight years.

25 Q Before you started your shift Friday night did you get like

1 a turnover briefing from the daytime surveillance agents?

2 A Yes. The team leader for the special operations group,
3 Special Agent Roberta or Bobbie Bero had told us that not only
4 were they aware that Mr. Reed was aware that he was being
5 surveilled, that there had been a confrontation where he had gone
6 into a parking area and he had stopped his vehicle and he then
7 got out of his vehicle and made eye contact and came yelling at
8 one of the agents who had been doing the surveillance.

9 The agent was Special Agent Melanie Kersey. She
10 broke contact in order to avoid any type of physical
11 confrontation, which is what we were told to do at that point.

12 Q Just to make life easy for the reporter, Bero, is that B-e-
13 r-o?

14 A That's correct.

15 Q And how's "Kersey" spelled?

16 A K-e-r-s-e-y.

17 Q And so then that was the state of your knowledge about Mr.
18 Berry, the investigation, and what he'd been up to that afternoon
19 when you started your shift Friday night?

20 A That's correct.

21 Q Were you and Sergeant Dyksterhouse, were you in different
22 vehicles?

23 A That's correct.

24 Q But were you staying in radio contact the whole time?

25 A That's correct, we're using our radios constantly. They're

1 a constant live feed based type situation. We're reporting what
2 our activities were and what Mr. Berry was going to be up to.

3 Q Now you were the affiant for the complaint that Mr. Berry
4 was arrested on, correct?

5 A That's correct.

6 Q And before we get to the incident that you covered in your
7 affidavit, before that incident happened, were you made aware of
8 something that Mr. Berry did with Sergeant Dyksterhouse?

9 A You mean that night of the surveillance?

10 Q Yes.

11 A Yes. That's actually in the affidavit, I believe, where
12 the incident occurred where Task Force Officer Dyksterhouse had
13 followed him out of the area where his residence was and had
14 followed him up M-139 to another neighborhood where he had pulled
15 off and parked his vehicle and then had gotten out of his vehicle
16 and it was nighttime. It was approximately -- it was after 9:30.

17 And he had hopped out of the vehicle and came running
18 at him yelling while he had eye contact with him. Task Force
19 Officer Dyksterhouse radioed it, said I'm breaking contact and
20 pulled away, but he said he still saw Mr. Berry coming at him as
21 he was proceeding away, driving away.

22 In fact, he had driven over a curb and through a yard
23 to avoid the contact.

24 Q So then for a moment there visual surveillance of Mr. Berry
25 was lost?

1 A There had been two main breaks in the visual surveillance,
2 one was when he was leaving his residence and then after he was
3 heading back to his residence. There were two times where there
4 were breaks in the actual surveillance that we re-established
5 them.

6 Q Okay. But what I mean is after Detective-Sergeant
7 Dyksterhouse took off there was a break and then did you re-
8 acquire him?

9 A Actually, what happened was he broke off, and when I
10 realized that there might be a confrontation and that he was
11 breaking contact I then tried to pick up the eye and I then came
12 by that same road that they were on, and then I saw Mr. Berry on
13 the street and I passed by.

14 Q Did you use the phrase "pick up the eye?"

15 A Yes.

16 Q Okay. I assume that's an internal --

17 A It's whoever has the main view or surveillance of the
18 target or the subject.

19 Q All right. So then you picked up the eye on him at that
20 point. What happened?

21 A It was just briefly for a moment I drove by at, you know,
22 normal speed through the neighborhood, and then there was a
23 series of exchanges of different people trying to maintain the
24 contact.

25 There were intermittent breaks of surveillance, for

1 lack of a better thing, because the neighborhood had a lot of
2 people out and about that night and there was concern of hurting
3 someone who might be out walking through the streets or anything.

4 But we saw the vehicle had remained in place.

5 Q Let's jump forward then if you can in very wave top summary
6 without going, you know, through specific turns on specific
7 streets and distances, just kind of summarize that activity
8 briefly up to the point where you were behind Mr. Berry and he
9 was stopped in the road.

10 A After 10:30 he was leaving the residence mosque that he was
11 at and then he was heading in the direction of his residence at a
12 high rate of speed, and Task Force Officer Dyksterhouse and
13 myself followed him.

14 Task Force Officer Dyksterhouse caught him first at
15 an intersection. When Berry stopped at the intersection at the
16 stop sign Task Force Officer Dyksterhouse broke contact as Mr.
17 Berry continued and then because he thought he would have been
18 identified again so he said, okay.

19 So I followed through the stop sign then, maintained
20 the contact. There were two turns made, it was Tilley Road and
21 then East Marquette Woods Road. He came to a complete stop and
22 he sat there for approximately -- and it's an estimate -- three
23 minutes, turned his light off, lights off, and just sat there.

24 I maintained a distance approximately 50 feet because
25 I wasn't sure what he was up to or what he was going to do. I

1 left my car running, left my headlights on. He had shut his
2 down.

3 Task Force Officer Dyksterhouse came up behind me,
4 stopped. We waited. Shortly after he came up then Mr. Berry
5 then proceeded, he turned his lights back on, made a turn, and
6 then was heading -- we later established he was heading back to
7 his residence because he turned up Woodland Drive.

8 It was at Woodland Drive where I still had the eye,
9 and I thought it doesn't matter if I'm burned or not because
10 we're maintaining contact but I kept it at a distance. He turned
11 up. I followed behind. It was at that point that Task Force
12 Officer Dyksterhouse radioed me, he said it looks like he's going
13 home. He goes, you can break contact, it looks like it won't be
14 an issue.

15 I stopped and was actually looking to turn around and
16 I saw several cars were passing behind me, the lights of them,
17 when he hit is brakes, threw it in reverse. I saw his reverse
18 lights coming at me and I saw he was accelerating in my direction
19 very quickly.

20 Q Where was Task Force Officer Dyksterhouse at this point?

21 A He had hung back so that way if there had been -- in order
22 to allow a maneuver in case there was any turns or anything else
23 done, and I had lost contact. He could come and fill in.

24 Q All right. So then he was not in the immediate area then?

25 A No, and he had had difficulty pulling in where I was at

1 because of where I was positioned in the road, I was more or less
2 blocking because I'd stopped right at the intersection of
3 Woodland and East Marquette Woods Road so it's kind of there.

4 He could have squeezed in but it would -- so he just
5 stayed in the general vicinity.

6 Q All right. Now, before we go into your perceptions of what
7 happened after those reverse lights came on, have you received
8 some unique training in tactical driving from the FBI?

9 A I think it's only unique for law enforcement officers or
10 FBI, we go to what's called TEOC, it's Tactical Emergency
11 Operator's Course, where FBI agents are trained in using your
12 vehicles in ways that your average person doesn't need to or
13 isn't taught how to do.

14 You learn the limits of certain vehicles, front wheel
15 drive, rear wheel drive. You're given obstacle courses that
16 you're gone through. You do slalom-type things through that.
17 You learn how to maneuver curves at a higher rate of speed than
18 what people normally went.

19 Q So then this is specialized driver training?

20 A Exactly.

21 Q When you saw -- let's go now then to where you're sitting
22 there, your lights are on, his lights are on, you're both stopped
23 on the road, correct?

24 A That's correct.

25 Q You saw his rear light -- or, excuse me, his back-up lights

1 come on?

2 A That's correct.

3 Q Then what happened?

4 A Well, he came at me and he was kind of -- and I saw that he
5 was accelerating at a high -- and this is all split second.

6 In fact, one of the things I noticed was in
7 situations like that you tend to sometimes your mind will slow
8 things down. He was coming at me at a high rate of speed.

9 And what made me realize that specifically was his
10 vehicle was -- when someone's backing they're trying to steer it,
11 they're doing over-corrections, and he was wobbling as he was
12 coming at me. It wasn't a slow like backing up like he was just
13 going to come talk to me or something. He was coming at me and I
14 saw the wobble because the lights were emphasizing that, and I
15 realized at that point he was trying to hit me.

16 Q And so then you had a decision to make how to respond to
17 that, correct?

18 A Exactly. In the split seconds that I was deciding the
19 first thing that crossed my mind was I referred back to our
20 deadly force policy where he's coming at me with a vehicle and I
21 thought at that time this is one of those situations where do I
22 shoot, and because I carry an active gun when I'm on surveillance
23 and it actually crossed my mind initially is this one of these
24 where I shoot in order to eliminate that threat.

25 And then it's ironic I then thought of when I played

1 football I thought either way I'm going to end up probably
2 getting hit by the vehicle, and instead of taking the hit I
3 thought I might be able to shuck him by or come by.

4 So I accelerated hard, turned a hard left, and then
5 turned right into him in order to -- I wanted to be in a position
6 where if he did something as a follow-up move I was in a position
7 possibly to an advantage to address whatever follow-up action he
8 may do.

9 Q Now, in this thought process, this decision, albeit a very
10 tight matrix, this decision-making matrix of yours, you said that
11 the thought came in your mind about how hard the hit was going to
12 be if he made contact with you?

13 A Exactly. And I thought that -- I thought to myself at the
14 rate, because having -- I've been in several accidents, and I
15 thought to myself there's going to be that initial blast that you
16 feel and I didn't want to have that where I'm stunned because of
17 his action, and then it would have been who responds next.

18 Because I was actually thinking at that point he's a
19 terrorism subject, he's had problems before, he's gone to
20 people's cars as far as coming up to address them aggressively,
21 and now he's at the point where he's coming at me with his
22 vehicle, and I really didn't know how far he was willing to take
23 it and so I was preparing for whatever would be the worst.

24 Q And the part in your decision-making process where you're
25 actually asking yourself do I pull my weapon out, without going

1 into great detail is it, you as a dozen-year veteran of the FBI,
2 fair to say you received a significant amount of training in the
3 use of deadly force?

4 A That's correct. We receive it at the academy. It's
5 constantly throughout our training. We have classroom
6 instruction. We have a firearms training simulator where you
7 have situations where you're reacting and you actually are
8 drawing a firearm.

9 And then you have an attorney who's there who's
10 grilling you -- it's an FBI attorney -- who's grilling you as to
11 why did you draw your weapon, why did you shoot, why didn't you
12 shoot, and you have to respond what was your reasoning and
13 rationale at that moment for doing that, and it's part of the
14 training in order to do that.

15 We also have situations at Hogan's Alley where we do
16 scenarios where you also have to justify what were the actions
17 that you were doing either way, and then additionally we also
18 have firearms training where we're given regular deadly force
19 briefings and any updates or cases and things like that that
20 apply to it.

21 Q Now, that's after you're out in the field and you're a
22 full-fledged agent, right?

23 A That's correct.

24 Q How many times a year is that?

25 A Firearms training at least quarterly.

1 Q And these quarterly firearms sessions then it's not just
2 marksmanship training, it's also judgment training?

3 A We do legal. Every time is not specifically the deadly
4 force policy, but we have deadly force training, we have case
5 law.

6 There's different legal presentations that are done
7 that address issues that would be relevant to an agent especially
8 in regard to current case law issues that you're going to face.

9 Q And again without going into -- without reciting from heart
10 the FBI's deadly force policy, is it fair to say that that
11 decision is pounded into FBI agents that drawing your weapon is a
12 very big deal?

13 A Exactly, and that's at that moment that's why it was one of
14 those things where what clicked in my mind was one of the
15 scenarios we're given tied into our deadly force policy is
16 because you have to say that it was necessary and that you have a
17 reasonable belief that the person is going to use a deadly weapon
18 against you that will cause you either physical damage or cause
19 death.

20 One of the scenarios that we are specifically given
21 and have been given is someone using their vehicle as a weapon
22 against you in order to kill or hurt you.

23 Q And this deadly force policy, that was specifically briefed
24 as part of the operational plan briefing before the surveillance
25 started?

1 A That's correct. We're required to have a deadly force
2 briefing in writing and also gone over every time we do an
3 operation, whether it's a search warrant, an arrest warrant, or
4 any type of operation similar to that.

5 Q So then as part of your decision-making you thought about
6 whether it was necessary to pull your weapon and fire but instead
7 you decided that you might be able to get out of the way?

8 A Minimize and maneuver away, correct.

9 Q And describe that maneuver, the one that took you out of
10 his direct path in detail?

11 A It was a -- I did a hard left with my steering wheel, I
12 spun it, and I accelerated hard, and then I realized I was facing
13 that way as he's coming by because my initial conception of it
14 was to get out of the way.

15 But then with that -- and it's pure reaction, it's
16 not like I thought it out, each step -- was to, okay, I want to
17 make sure I'm in a position where he doesn't have a tactical
18 advantage because I didn't know if he had a weapon or if he was
19 going to come out at me as he did the others at that point.

20 Q And that maneuver, in fact, he did not make contact with
21 your vehicle as a result of that maneuver; is that correct?

22 A That's correct. In fact, we ended up where his vehicle was
23 here, he had maintained basically a straight line, and I was
24 pointed generally towards his direction and when we had actual
25 eye contact with each other at that point.

1 Q Then what happened?

2 A I paused for a moment. I wanted to see if he was actually
3 going to take any further action. His demeanor and mannerism, I
4 did not get the impression at that point, it looked like it
5 diminished rather than became more aggressive, so then I
6 proceeded on down to a stop sign.

7 He followed me, he was probably about a half-car
8 length behind, and he had his high beams as he was following me.
9 He wasn't -- he wasn't right on my tail but he was close enough
10 where his high beams were lighting up my vehicle and passenger
11 part.

12 And then I stopped at a stop sign, made a left away
13 from his residence. He then went to the right more which is in
14 the direction of his residence.

15 Q Well, based on the conduct that you described why didn't
16 you arrest him right then and there?

17 A Our mission was to do surveillance and to monitor him.
18 That's one part of it. The other part is I was under the
19 mistaken belief at that point in time that he had to clearly have
20 been identified -- I had to be clearly identified to him that I
21 was an FBI agent either with creds, lights, something, and that
22 had never been done.

23 And really I was focused more on the mission at that
24 time but I didn't think that it'd be something that could be
25 charged because of the fact that I thought he had to clearly know

1 that I was an FBI agent.

2 And at no point did I say to him "FBI" or did I have
3 anything light up that showed "FBI" so I did not think that until
4 later we had a conversation where it was discussed that -- and
5 that's my ignorance of that particular law.

6 Q So even though you had not -- but going into this when he's
7 coming back at you, did you -- what did you think at that time
8 about whether he knew that you guys were all -- the surveillance
9 was being conducted by the FBI?

10 A There had been -- when we'd gotten briefed the prior shift
11 had the surveillance team leader who we referred to, Bobbie Bero,
12 she made it clear that she said he knows we're onto him.

13 And additionally there had been search warrants
14 executed and there'd been other interactions with him, and I was
15 given the impression that he knew very well that he was being
16 surveilled by the FBI based upon -- and I don't know the case and
17 the details of all the things that happened but I was given the
18 impression that he knew very well the FBI was on him.

19 And even when we were following him it's not like he
20 called 9-11 and said to the police he was being harassed by
21 someone or anything like that.

22 He had actually gone through what we would call
23 surveillance detection routes. He'd gone out of his way to try
24 to see who's following him and done things to see what's going
25 on, but yet there'd been no law enforcement or contact or

1 anything like that.

2 Instead, it's been -- it's a surveillance game that
3 goes on, and that's not meant in any derogatory way, it's just is
4 someone following me or not and he had done things specifically
5 to see that.

6 And in the realm of who would have been watching him
7 I think it would have been pretty narrow that he would have
8 thought it was anyone else, and that's my opinion.

9 Q In your experience someone in his situation actively
10 confronting and escalating against the FBI, what effect did that
11 have on your assessment of the situation?

12 A Well, when the lights went on there that's what came to my
13 mind which led to the deadly forces like he's coming at me as an
14 FBI agent, that's what I immediately -- it's not like -- there's
15 been surveillance we've done where someone's a civilian or
16 something and they might think someone was just maybe harassing
17 them or, you know, road rage instance like that.

18 I actually had stopped at that point anyways because
19 I was looking to break contact and turn around. He had continued
20 some and then he stopped and came back and that's when I thought,
21 okay.

22 But the FBI part of it, he had known we had followed
23 him for quite some time. There had been no indication to think
24 that he thought it was a criminal or someone else who was -- or
25 like a road rage incident.

1 Q But in terms of your own assessment of this universe of
2 facts and its affect on your assessment of the severity of the
3 situation, the fact that he was confronting FBI, how did that
4 play in?

5 A Well, that escalates it because he automatically, as an FBI
6 agent, it's not Sam Moore, the citizen that he's -- there's an
7 instant. It's I'm in the role of serving the government and
8 that, to me, is a higher level because he's confronting a law
9 enforcement officer.

10 Q Thank you.

11 THE COURT: Cross-examination?

12 MR. MUAWAD: Thank you, your Honor.

13 CROSS-EXAMINATION

14 BY MR. MUAWAD:

15 Q Besides the day of the interaction that led to the
16 complaint in this case, did you have any other interaction with
17 Mr. Berry prior to that date?

18 A No, not that I know of.

19 Q Was that the first date that you saw him personally --

20 A Yes.

21 Q -- during the surveillance? Anything prior to that you
22 wouldn't really have any personal knowledge of, right?

23 A That's correct, as far as in --

24 Q Like the flight, like the attempted flight to England, what
25 he was doing, and all that stuff?

1 A I was aware of that but --

2 Q Okay. And you knew that he was told not to go because he
3 was on the "no-fly" zone (sic), and you're aware that he did not
4 go or attempt to go, correct?

5 A That's correct.

6 Q All right. Going to the day of the surveillance, it sounds
7 like the date prior to the date of the actual complaint he was
8 aware that -- at least you think he was aware that he was being
9 surveilled by somebody, right?

10 A That's correct.

11 Q No one came up to him prior to the date of the complaint
12 and says, hey, I'm the FBI, I'm surveilling you, or I'm police
13 officer and anything like that?

14 A As far as I know no one identified themselves as FBI,
15 that's correct, or law enforcement.

16 Q All right. And the day of the incident it progressively,
17 would you say, got worse with his getting out of the car and
18 trying to see who was following him, or did he not do that the
19 day of the complaint, the day that you stated that he put his car
20 in reverse?

21 A I can't say if it was progressively worse because I don't
22 know the full details on what happened in the parking lot with
23 the previous team.

24 I was radioed what was going on and I saw the after-
25 effect, and I know the task force officer's response by driving

1 through the yard, especially that night, because we had said to
2 be careful because we knew there'd be a lot of pedestrian
3 traffic.

4 Him driving through that yard was significant because
5 that's not something he -- that's not his personality or his
6 demeanor, so that -- so whether that's quite or not, I don't
7 know.

8 Q Okay.

9 A I can't say.

10 Q What street were you on prior -- just prior to the incident
11 occurring, prior to his lights coming on and going in reverse?
12 Where were you located?

13 A East Marquette Woods Drive was where I was before I made
14 the turn onto Woodland Drive.

15 Q When you got onto Woodland Drive you would have been behind
16 Mr. Berry --

17 A That's correct.

18 Q -- would that be correct? And about how many car lengths
19 would you have been behind him?

20 A I'd say approximately three, three or more.

21 Q Okay.

22 A I actually was conservative on distance because he was
23 probably a little further away.

24 I'm big on making sure that when I do surveillance
25 not to be too close to the individual because it allows you to

1 react and see what's going on.

2 Q What kind of vehicle were you driving?

3 A I was driving a silver Buick LaCrosse.

4 Q Any audio or video in that car?

5 A Recording, you mean?

6 Q Right.

7 A No.

8 Q And he was driving, what, a Taurus or a Ford?

9 A 1984, it was a maroon Ford Taurus.

10 Q Okay. And did you have a passenger with you or you were by
11 yourself?

12 A I was by myself in the vehicle.

13 Q And then as you turned onto Woodland, is it --

14 A Yes.

15 Q -- Woodland, did he immediately put his car into reverse or
16 were you on Woodland for some time before he put his car in
17 reverse?

18 A I was actually on Woodland and then and I had stopped. He
19 was still continuing and then his brake lights went on and then
20 he came back.

21 Q Okay. Can you describe Woodland? Is it a residential
22 street?

23 A It's residential.

24 Q Is it a wide residential street?

25 A I'd say it's wider than a lot of the older streets you'll

1 see here in Grand Rapids.

2 Q Were there cars parked on both sides of the street?

3 A I believe so, that there were cars on at least one side.

4 It was dark and, like I said, when the incident happened I'm
5 pretty sure there were some cars there.

6 Q Woodland runs east-west, north-south?

7 A North-south.

8 Q And it's there's two lanes, north and south traffic, would
9 that be correct?

10 A It's a residential road but, yeah, that's --

11 Q Is it a residential road that has a divider between the two
12 roads or just one big street with cars parked down the side?

13 A I don't think it has a divider. Like I said, it was night
14 time but I don't recall.

15 Q All right. Would you say that the street was as wide as
16 this courtroom here? What I mean, and I'm pointing to the sides
17 here, not --

18 A You're talking wall to wall?

19 Q Wall to wall, yeah.

20 A Probably that's about right.

21 Q Okay. So when you saw the brake lights come on and --

22 THE COURT: For future reference, this courtroom is
23 probably 22-1/2 to 23 feet wide.

24 MR. MUAWAD: Okay.

25 THE COURT: So we have a record.

1 MR. MUAWAD: That's amazing, well, you know that.

2 Thank you, Judge, I appreciate it.

3 BY MR. MUAWAD:

4 Q When he put the brake lights on did he immediately start
5 going into reverse or did he --

6 A Brake lights. The white lights came on --

7 Q Okay.

8 A -- and that's it.

9 Q All right.

10 A There wasn't any pause, sat there for a few minutes, and
11 then they turned on.

12 Q Was he heading straight back --

13 THE COURT: I'm sorry.

14 MR. MUAWAD: Sorry, Judge.

15 THE COURT: There was no pause, you said?

16 THE WITNESS: There was -- other than the transition
17 of foot and brake it wasn't like there was a delay where we sat
18 there for a minute and then it came. Brake lights came on, the
19 white back-up lights came on right after that. It was
20 sequential. It was almost immediate as far as --

21 BY MR. MUAWAD:

22 Q Were you still three car lengths behind him when that
23 occurred?

24 A It was at least three car lengths behind.

25 Q Okay. And there was, I would take it, there was enough

1 room for another car to be to your side? Could there be another
2 car coming in the opposite direction passing you. Was there
3 enough room for that?

4 A I'm not sure of your question.

5 Q Well, the street was big enough where if Mr. Berry's intent
6 was to go around you, could he have done that? Was that street
7 that wide? Instead of going and trying to hit you, could he have
8 gone around you?

9 A Because I maneuvered out of the way, yes -- if, yes. If
10 you're saying was there room for him if I stayed fixed if he
11 could have gone around?

12 Q Right.

13 A Yes, that's why I was able to maneuver out of the way.

14 Q Did you maneuver out of there right away or did you wait
15 till he got a certain amount of feet before you decided to make
16 that maneuver?

17 A I need you to qualify that a little better.

18 Q When you made the maneuver to go forward and around him, I
19 think is what you testified earlier, did you do that immediately
20 when you saw him backing up toward you, or did you wait just to
21 see where he was going with the car?

22 A Very difficult for me to say time-wise how it was because,
23 like I said, in the instantaneous thinking that's going on with
24 that and I saw him coming I had enough time to see that he
25 wobbled, and it was at the point that I realized he was coming at

1 me and he was wobbling and he wasn't turning is when I realized,
2 because there was a series of events.

3 When I saw that wobble I realized he's coming me, the
4 speed was -- he appeared to be accelerating at me.

5 At that point I realized that's when I went through
6 the mind of he's going to hit me. Do I use deadly force because
7 that's one of the scenarios we're given. And then what came to
8 my mind was I might be able to minimize the hit because I thought
9 I still might get hit on my rear end and that's when I
10 accelerated, turned hard, he came here, and I turned back in.

11 So to put a time on it I can't do that. I'd be --
12 that'd be inaccurate for me to even say that because --

13 Q When you saw --

14 A -- it happened very quickly and in my mind things slowed
15 down because of what was going on.

16 Q When you saw the car wobbling, would you say you were two
17 car lengths away, three car lengths away, one car length away?

18 A It was probably at least two car lengths away.

19 Q Okay. And was there any indication that Reed was going to
20 be going around you but just in a reverse direction?

21 A No, because his wobbles when he was doing corrections, they
22 were keeping him as if he was maintaining a straight line course
23 of action, not going in either direction. I had enough time.
24 That's what made me reinforced me he's coming at me --

25 Q Okay.

1 A -- because of his acceleration and there's the wobble that
2 occurred.

3 Q Okay. And then did you, after making your maneuver did you
4 try to get out of your car when you went around him and talk to
5 him, or your mission was not to have any contact with him; is
6 that correct?

7 A I said nothing to him and I did not get out of my vehicle.

8 Q Did Mr. Berry stop after you went around him and get out of
9 his car in any way?

10 A No, he did not, and I don't know if he would have been able
11 to because the way my car was positioned in proximity to his I
12 think his door may have been blocked by that.

13 Q How long were you two side to side where his door was
14 blocked?

15 A I'd say guessing --

16 A Mm-hmm.

17 Q -- a minute or two.

18 Q Sure. Okay. During that minute or two was there any
19 conversation going on between you and Mr. Berry?

20 A Nope, none.

21 Q Okay.

22 A No non-verbal exchange.

23 Q Were you just sitting there?

24 A We had eye contact.

25 Q Okay.

1 A Because I was waiting to see --

2 Q Did he give you the finger or anything like that?

3 A No, he did not.

4 Q Okay. So you guys were sitting there for a minute or two
5 minutes and then what did he do, he put his car in reverse and
6 left or you left the scene?

7 A I then left. I proceeded because I thought I was going to
8 again create distance and space because I was thinking our job
9 was not to have contact with him --

10 Q Okay.

11 A -- or to arrest him. Our job was to keep distance, monitor
12 what he's doing so that --

13 Q While you two were side to side in your cars he could have
14 gotten out of the passenger side, right, if he wanted to?

15 A I would assume if the door's working probably.

16 Q Right, if the door's working, yeah, the door's working
17 properly. But he didn't. He just stayed in the car a minute or
18 two minutes and then he goes forward or you left, you left the
19 scene?

20 A I left the scene.

21 Q All right. And was there continued surveillance of Mr.
22 Reed after that?

23 A Yes.

24 Q Did he go home?

25 A Yes.

1 Q Okay. There was no further contact with Mr. Reed, correct?

2 A That's correct.

3 Q Prior to this --

4 A With my shift.

5 Q Right.

6 A That night until the morning at 8:00 a.m. there was no
7 other activity from that point on, that's correct.

8 Q All right. You're well aware that Mr. Reed had some
9 knowledge of an investigation going on into potential terrorist
10 activities --

11 A Yes.

12 Q -- prior to this incident with you, right?

13 A Yes.

14 Q And up until that time he really never did anything
15 forcibly against the FBI other than maybe come out -- other than
16 maybe come out on one of their surveillance and, you know, kind
17 of had some verbal exchanges with the FBI?

18 A My understanding was that he had other surveillances where
19 they were burned, and I don't know if there were interactions or
20 not with that. We were just advised to be careful with him based
21 on his previous law enforcement and then with what was going on
22 at the time.

23 Q Okay. Thank you very much.

24 THE COURT: Redirect?

25 MR. FRANK: No, your Honor.

1 THE COURT: Fine.

2 You may step down. Thank you.

3 MR. FRANK: Nothing else from the government, sir.

4 THE COURT: Okay.

5 Evidence or proffer on behalf of the defendant.

6 MR. MUAWAD: Your Honor, on the proffer, some of its
7 going to be coming from the pretrial services report. It's just
8 background on Mr. Berry. I'm sure you've read it. Have you read
9 it yet or --

10 THE COURT: I have read the pretrial services report.

11 MR. MUAWAD: Okay. Just want to confirm with the
12 Court that he at the time of this incident was living with his
13 father and his stepmother.

14 His father is a photographer, and I'm not too sure
15 what his stepmother does but he was -- Mr. Berry was collecting
16 unemployment, trying to find a job, was living in the St. Joe
17 area.

18 And if I'm correct from the time that he was released
19 from the parole violation to the time of this incident there'd
20 been no criminal activity. He was not arrested for any state,
21 local criminal activity, if I'm correct.

22 THE COURT: What period of time are you talking
23 about?

24 MR. MUAWAD: Judge, I think it would have been --
25 excuse me, your Honor. He was discharged from parole June 26th,

1 2011, if I'm correct.

2 THE COURT: Okay.

3 MR. MUAWAD: And my client's confirmed that with me.

4 He's had no contact. He's tried to find jobs. He's,
5 again, living with his father and stepmother in the area.

6 And other than that for background that's all. We
7 can make our arguments regarding the elements for detention.

8 THE COURT: All right.

9 MR. MUAWAD: Thank you.

10 THE COURT: Fine. Thank you.

11 Closing? Government?

12 MR. FRANK: Yes, your Honor, thank you.

13 Your Honor, the United States concurs with the
14 recommendation of the probation office that Mr. Berry be
15 detained.

16 Turning first to the danger prong here. Obviously
17 this is a crime of violence so danger to the community is a
18 permissible basis to detain.

19 We think that the evidence before the Court pretty
20 clearly describes just an outrageous situation where someone who
21 knew that he was the subject of a long-running terrorism,
22 international terrorism support investigation on the weekend of
23 9-11, knew he was under FBI surveillance, was so bold as to
24 openly confront those agents, run towards them, shout at them,
25 and escalate his conduct up to the point where he created a

1 situation where an FBI agent, with all the training that goes
2 into being an FBI agent with 12 years of experience and all the
3 training and judgment that one builds over a dozen years in the
4 FBI, that FBI agent had to consciously think about whether he
5 should pull his weapon and shoot Mr. Berry based on the situation
6 that Mr. Berry created.

7 That is an outrageously bold course of conduct on Mr.
8 Berry's and it's an outrageously dangerous situation that he
9 created.

10 Also his past record as summarized in the probation
11 report of a history of problems with law enforcement of resist
12 and obstruct and his parole violations.

13 Also the fact that while he was on parole from the
14 State of Michigan he engaged in the conduct that resulted in this
15 Court issuing two search warrants and that has resulted in him
16 being the subject of an ongoing FBI material support of
17 international terrorism investigation.

18 So we think that his past history and his conduct on
19 the weekend in question and the context of that conduct pretty
20 clearly demonstrates that he's a danger to the community and that
21 just releasing him and taking his passport and maybe putting him
22 on tether would be insufficient to ensure the safety of the
23 community.

24 On the issue of flight, again he knew he was the
25 subject of an ongoing investigation. He knew from the affidavits

1 that he was provided with back in March of 2011 the basic
2 parameters of that investigation. He knew that the FBI took
3 every shred of digital media that he had out of his house, and
4 also had gotten a complete dump from Yahoo of his Yahoo account.

5 So he knows that the FBI is in possession of the
6 universe of digital information that his course of conduct
7 created. So he's got to know that he's in a fair amount of
8 trouble above and beyond the charge that's in front of this Court
9 and that gives him an incentive to flee.

10 Moreover, he bought, even though he knew he was the
11 subject of this investigation, as soon as he had that passport he
12 buys a ticket out of the country and he told the FBI agent that
13 as far as he was concerned it was a one-way trip; he was never
14 coming back.

15 Now, granted he told the FBI it's because he wants to
16 go to the UK and be with his wife that he's never laid eyes on.
17 Maybe so. But we think --

18 THE COURT: I'm sorry, you say he's never laid eyes
19 on his wife?

20 MR. FRANK: I believe that's in the testimony as Mr.
21 Muawad brought out this was an internet -- I forget the exact
22 term used --

23 MR. MUAWAD: Religious marriage.

24 MR. FRANK: -- religious marriage or something.

25 THE COURT: I heard that part but I didn't hear any

1 testimony that he'd never seen her before.

2 MR. FRANK: Well, just to avoid mucking up the record
3 I'll make a proffer that -- I mean, I could put the agent back on
4 -- that he and his quote, unquote, "wife" have never physically
5 met. The defense can stipulate to that or I could --

6 MR. MUAWAD: That's true but in the religious Muslim
7 community it typically works out where sometimes they get married
8 in the religious part of it to somebody overseas and it takes
9 many, many years to get that person over there to actually live
10 with each other.

11 So for the proffer that's correct but not necessarily
12 -- well, you can -- I'll make my argument but that's true, he
13 never has met her personally but they've had many, many contacts
14 and they were under the Muslim community husband and wife.

15 THE COURT: All right.

16 MR. FRANK: So in any event he says he was going to
17 go, you know, live in the UK with his wife that he's never
18 physically met. Maybe so. But just as possibly maybe not.

19 We know that he communicated to Begolly, you
20 know, a wish to travel to Somalia -- wink, wink -- for vacation.
21 That's a source of concern.

22 But the bottom line is he knew that he's the subject
23 of an investigation. He knew that he had been surveilled over
24 the weekend of 9-11 and he still makes this plan to take a one-
25 way trip to the UK. Granted, he didn't know at the time that

1 that trip was never going to happen.

2 But the only reason he's not in the UK right now is
3 because he was on the "no-fly" list, and the only reason
4 apparently that he didn't get in the car and drive to Midway and
5 try and make the flight was because our office extended the
6 courtesy of making a call that would save him a wasted trip to
7 Midway in Chicago.

8 THE COURT: The date of your call was what again?

9 MR. FRANK: It was the morning of the 22nd of
10 September, your Honor, and he was scheduled to fly the afternoon
11 -- fly from Midway the afternoon of the 22nd.

12 So the issue of flight we submit has to be assessed
13 in the context of the larger case and the larger investigation,
14 and the bottom line is Mr. Berry knows that the FBI possesses the
15 universe of his digital activity, his online activity, because
16 we've got all of his computers, all of his peripherals, and his
17 Yahoo account.

18 And he knows how seriously this case is being taken
19 by the US government. So that gives him an incentive. Obviously
20 he's not going to be flying under his own name but Canada is not
21 that far away either.

22 So based on the evidence before the Court, your
23 Honor, we believe he should be detained; that there's no
24 condition or combination of conditions that would ensure his
25 presence at trial and the safety of the community.

1 For that reason the government believes by clear and
2 convincing evidence -- believes that it has demonstrated by clear
3 and convincing evidence that he's a danger and by preponderance
4 that he's a flight risk.

5 Thank you.

6 THE COURT: Before you sit down, I want to direct
7 your attention to the last page, the second to the last page of
8 the pretrial services report which discusses the defendant's
9 criminal record.

10 There is a charge dated on the left hand column at
11 the very end, October 13th, 2005, delivery and manufacture of
12 marijuana.

13 Now, I'm following down on the right hand side the
14 various things that took place in regard to this. In June of '07
15 the defendant is put on one year probation.

16 Two months later that probation was revoked and the
17 defendant is sentenced to 18 to 48 months in prison.

18 Then apparently he must have been paroled again
19 because in December of '08 the parole was revoked. Pretrial
20 services didn't have the details on that.

21 In July of '08 the defendant's parole was revoked and
22 he was returned to prison again. Presumably then he would have
23 remained in prison for all of '09, '10, up until the middle of
24 2011.

25 But some of the activity here suggests that he wasn't

1 in prison that entire period of time. Do you know if there was
2 another parole after December of 2008 when his parole was revoked
3 and he was returned to prison?

4 MR. FRANK: I do know, your Honor, and there was. He
5 was released -- can I have a second, your Honor?

6 THE COURT: Yes, please.

7 MR. FRANK: I was just confirming and counsel also
8 helped me confirm, your Honor, that he came out of Michigan
9 Department of Corrections, or maybe it was the county jail, I
10 don't know, but he came out of custody in the summer of 2011 --
11 no, wait a minute. I'm sorry.

12 MR. MUAWAD: Your Honor, maybe I can help. He was
13 violated -- the MDOC violated him for these alleged activities in
14 March of 2011, and revoked his parole and kept him until the date
15 they released him which was June 26, 2011.

16 MR. FRANK: Right, but the Court's question, your
17 Honor --

18 THE COURT: That's part of my question.

19 MR. MUAWAD: Okay.

20 THE COURT: But he must have been paroled at some
21 point after December of '08 so they could --

22 MR. FRANK: That's right.

23 THE COURT: -- otherwise they wouldn't have been able
24 to violate him in March of 2011.

25 MR. FRANK: That's right. He came out in -- and I

1 can't remember if it was spring or summer, I didn't bring my
2 entire file with me -- but it was spring or summer of 2009 he
3 came out again, and then because not long after that the FBI
4 commenced its investigation and he remained on parole then up
5 until March of 2011 when the state violated his parole
6 immediately after the FBI executed its search warrant.

7 So he was out on parole during not long before the
8 FBI had commenced its investigation, months, within months.

9 THE COURT: Counsel, does that sound right?

10 MR. MUAWAD: It does sound right. He's just
11 confirmed with me that he was on parole for two years prior to
12 March 2001 (sic) which would tie in --

13 THE COURT: 2011?

14 MR. MUAWAD: -- 2011, excuse me, which would tie in
15 with the '08 activity, and then they revoked his parole in March
16 of 2011 and kept him until June of 2011. That's right, your
17 Honor.

18 THE COURT: All right. Fine.

19 Well, this information has to be gathered quite
20 quickly in order to afford a prompt detention hearing so once in
21 a while there are gaps --

22 MR. MUAWAD: Sure.

23 THE COURT: -- and I appreciate you both filling in
24 on that.

25 MR. MUAWAD: Yeah, no problem, your Honor.

1 THE COURT: All right.

2 Now, your opportunity, Counsel, for closing.

3 MR. MUAWAD: Thank you, your Honor.

4 Eighty percent of this detention hearing has to do
5 with these alleged terroristic activities, and what we haven't
6 heard today, Judge, is whether or not what he did was illegal
7 under any statute in the United States

8 There's activity of him going on the computer and
9 doing some stuff with subtitles and looking at propaganda
10 websites, but under 18 USC 2339(B)(I), the mere exercise of
11 rights guaranteed under the First Amendment of the United States
12 does not constitute material support.

13 And this is not a case where my client was training
14 in any way for Jihadist activities. He did not ever fly to the
15 Middle East or to Somalia to train or to carry out any conspiracy
16 with any known terrorist groups.

17 He was not trying to build a bombast video. He
18 certainly was not carrying out the activities that the two other
19 gentlemen, Begolly and Chesser, were carrying out which is very
20 extreme and comes to the level of material support.

21 And the fact that Washington, DC, hasn't decided what
22 they're going to do with my client, kind of leads to a testament
23 as to whether or not what my client was doing is a First
24 Amendment right or whether or not it violates any offense under
25 our United States statutes.

1 So I would state that I'm hoping the Court lends very
2 little weight, if any weight, to these issues because really it's
3 a gray area as to whether or not what he was doing was First
4 Amendment protected or material support.

5 But I think the fact that he hasn't been indicted nor
6 has there been a complaint nor has Washington made up their mind
7 on what they're going to do with him, I'm hoping the Court does
8 not consider this as a factor for detention.

9 Now, regarding the factors under 18 USC 3142(g), the
10 nature and circumstances of the offense charged including whether
11 the offense is a crime of violence, it is a crime of violence but
12 it's not your typical crime of violence with a gun or a knife or
13 a rape or something like that.

14 I would characterize it as dumb, there's no question
15 about that, if the facts turn out to be the facts, but the weight
16 given to that first count probably is going to be given against
17 my client, but as far as the severity of it I just don't weigh it
18 to the category whether or not a gun was used or something else.

19 Roman Numeral Two or Section Two talks about the
20 weight of the evidence against the person.

21 Well, on the negative side he did allegedly use his
22 car to back up and was heading in the direction of an FBI agent
23 who did a maneuver and went around him.

24 But what's tell-taling of whether or not he was
25 really intending to hurt this person is when they were sitting

1 there for a minute or two minutes he didn't do anything.

2 He could have gotten out of the passenger side of the
3 car. He could have tried to fight the agent. He could have
4 tried to do something. He could have tried to maneuver his car
5 and go in front of the agent's car and try and back up and again
6 like a road rally, and that just never occurred.

7 I think that goes to some weight that he wasn't
8 trying to do anything serious or in his mind nothing serious
9 against the agent.

10 When you look at the history and characteristics I
11 know you've read the probation or pretrial services report. He
12 has had in the past marijuana use and some alcohol use but
13 certainly I don't think that issue has really been a prevailing
14 issue in his life in several years if not more.

15 He does have a father who lives in St. Joseph,
16 Michigan. He's unemployed but he's on unemployment. That's part
17 of his financial resources. He's lived in St. Joe most if not
18 all of his life. He's got community ties again to his father and
19 stepmother.

20 And regarding his criminal history he has obviously
21 the problems in 2003, I believe, and some in 2005 that have to do
22 with possession of marijuana. He has the one resisting in 2005
23 but I don't know the facts surrounding that circumstance.

24 And then he was not on probation or parole when this
25 incident occurred, the complaint was filed. He was off of parole

1 for the MDOC and he was not on any type of probation nor was he
2 pending trial.

3 The other thing I think helps me argue this. Yes, I
4 was contacted to tell Mr. Berry, look, you're on the "no-fly"
5 zone (sic). Don't go to the airport and fly out.

6 And some people actually would have said, I don't
7 care what the FBI says, we're going to go and try it anyway. He
8 didn't. He stood down and he stayed in his house and he didn't
9 go and I think that's a testament to the fact.

10 The issue of argument he was going to England, yeah,
11 he was going to England to meet and spend time with his religious
12 wife. Again, there's been no testimony he said to the FBI, hey,
13 I'm leaving, you know, United States, I want to leave so I don't
14 get indicted or so that if I do get indicted, you know, they
15 can't touch me.

16 And that's -- he was going there to fly to see this
17 girl, no question about that. And he had a ticket there and a
18 ticket back. It wasn't a one-way ticket.

19 So I don't think there's been any indication as far
20 as a flight risk; that what he did going to England was an
21 attempt to be a flight risk to avoid any prosecution of potential
22 future charges.

23 I think basically he knew about what was going on.
24 He, in his mind, did not know when these charges were going to
25 come down, if ever, and he decided it was time to get kind of a

1 new window of opportunity to get a new life somewhere possibly.
2 Whether England would have been it or not, I don't know. I can't
3 believe they would have let him stay there on a visa for more
4 than six months but that would have been England's problem.

5 Other than that I don't think he's a flight risk. I
6 think you have a situation when you take away all of the
7 controversy concerning whether he was carrying on a First
8 Amendment right or whether it's really a material support to
9 terrorism.

10 When you look at everything else I think that I'm
11 asking the Court not to detain him. The Court could put him on a
12 tether. The Court could just let him stay in his father's house
13 doing what he's doing.

14 Obviously, the precipitation for this was
15 surveillance. I'm not saying that the FBI didn't have the right
16 to do surveillance. I'm not saying they didn't have the right to
17 do what they were doing in any way. But the fact is is prior to
18 the surveillance he had no forcible contact with the FBI even
19 though he knew that there were two warrants executed and he knew
20 that there was potential indictments that may have come down on
21 him.

22 So the Court looks at all the factors, the
23 circumstances, the umbrella of circumstances. I'm arguing for no
24 detention.

25 And I don't think he needs to test for seriousness of

1 the danger to any person or the community. And the reason I say
2 that is that he's never posed, prior to surveillance, any risk to
3 the community. He's never harmed anybody in the neighborhoods or
4 in St. Joe area or any person at all.

5 I think what precipitated this was just a lot of
6 frustration and anger over being followed. And I'm not telling
7 you that if the facts come out to be the way they are that he did
8 the right thing, but as far as detention is concerned this is --
9 I don't think it applies and I think that he will abide by
10 whatever bond conditions that the Court gives him.

11 Thank you.

12 THE COURT: Thank you, Counsel, for your remarks.

13 Well, the issue before the Court is whether the
14 government has shown by a preponderance of the evidence that no
15 condition or combination of conditions will assure the presence
16 of the defendant for future court proceedings and/or whether
17 they've shown by clear and convincing evidence a higher standard
18 that there are no conditions or combination of conditions that
19 will assure the safety of the community.

20 There is no presumption in effect in this case.

21 The Court has heard a lot of testimony about
22 activities the defendant may or may not have been involved with
23 in regard to subtitling videos and being on certain invitation-
24 only websites that may or may not be involved with terrorism.

25 I think we ought to make it clear that the Court is

1 not asked today nor is the Court determining whether or not the
2 defendant committed any criminal activity in any of those
3 circumstances nor is the Court adjudicating in any way the
4 defendant's First Amendment rights that he may or may not have
5 had.

6 What I take away from all of that testimony is only
7 that there was an investigation going on and that the defendant
8 knew of that investigation by the FBI and reacted in a certain
9 way or committed the instant matter that leads us here today
10 knowing of this investigation and knowing the FBI was looking at
11 him.

12 So, we're not looking at what the investigation
13 itself shows, only that the defendant was aware of it. Other
14 issues are for another day.

15 Frankly, I am more troubled by the defendant's
16 criminal history to date and that goes back to when he was a
17 minor.

18 In addition, there have been some problems as
19 reflected in this pretrial services statement about diagnosis
20 with bipolar disorder and involuntary hospitalization or
21 alternative treatment program order issued back in 2005 which
22 reflected that the defendant might harm himself or others and so
23 forth.

24 There was a lot of use of illegal drugs that
25 allegedly has now terminated back as of the summer of 2009, but a

1 lot of that led to the prior criminal history which has numerous
2 instances involving possession of marijuana.

3 Defendant has had medication but he's not previously
4 -- which he's been on previously, substantial medication. He's
5 not prescribed those at this time.

6 So there is a history here that has a lot of factors
7 in it and it has nothing to do with the matters being
8 investigated by the FBI.

9 And these are what are really before the Court today.
10 And it's not just the charges which are basically possession of
11 marijuana, possession of marijuana, assault, obstruction of a
12 police officer, possession, possession, possession, possession of
13 a switchblade, disorderly person, illegal occupation, and then
14 the most recent one which is again delivery and manufacture of
15 marijuana.

16 But it's the defendant's reaction to those offenses.
17 Specifically going back to 2003 we have a probation -- the
18 defendant was placed on probation but it had to be revoked. He
19 was subsequently placed on probation again and that had to be
20 revoked.

21 In 2004 defendant was again on probation for another
22 offense and that had to be revoked.

23 In 2005 the defendant violated his bond for reasons
24 that are not stated here but it did result in him serving time in
25 jail.

1 Again in 2005 we have the defendant having been
2 placed on probation for this latest marijuana offense and that
3 probation had to be revoked and the defendant was sentenced to 18
4 to 48 months in prison.

5 He was paroled but that parole was then revoked and
6 he was returned to prison. He was again paroled and again it was
7 revoked.

8 When a person is being -- asks to be placed on bond
9 or the bond is being considered it's implicit that the Court is
10 placing a certain amount of trust in that individual that he will
11 abide by the conditions of his release, otherwise we cannot
12 effectively have a person on bond.

13 This is a prediction and nobody knows what's going to
14 happen in the future. Probably even a defendant doesn't always
15 know what he's going to do in the future.

16 But we have to make our best estimate and one of the
17 ways we do that is to look and see how a defendant has behaved in
18 previous similar circumstances, or in other words when he's been
19 under the trust of the Court in previous instances, and here
20 there's been repeated violations that led to probations being
21 revoked and parole being revoked.

22 In short, the defendant has been a management problem
23 and has not abided by these various opportunities to remain out
24 of prison. And then we couple that with the allegation in this
25 case that knowing the FBI was surveilling him and knowing they

1 were watching but not taking any other action, probable cause at
2 least shows that he attempted to ram an FBI agent's car.

3 Well, that takes a lot of guts. I think the U.S.
4 Attorney said that was a bold move, an outrageously bold move.
5 Not very many people are willing to do that. And that shows
6 somebody who is again in effect thumbing his nose at law
7 enforcement and not willing to abide by the kind of conduct that
8 is expected of people in our society and certainly people we're
9 going to place on bond. It makes management very difficult.

10 Now, the issue of flight here is one of concern
11 because the defendant did obtain a passport and was going to
12 leave the country, by his own statement was going to leave this
13 country permanently. Clearly, there's some dissatisfaction with
14 the country.

15 Whether he was going to go to Somalia later on or not
16 the indication was he was going to remain away from this country.
17 He's got a wife, a religious wife, over in London and he wanted
18 to go over there and start a new life and so forth.

19 The seriousness of this investigation, seriousness of
20 the resources being thrown at this investigation, I can see the
21 defendant might have some concern about remaining here. But that
22 makes him a flight risk. There are other ways to leave this
23 country even if one is on the "no-fly" list I suppose.

24 Whether he's leaving to work with a terrorist
25 organization in Somalia or just going over to be married over in

1 London or England and who knows where after that, he's still not
2 here. And there's every incentive to leave. He's attempted to
3 leave.

4 Now, in a couple instances he's shown good judgment
5 in not trying to fly when there's a "no-fly" rule, but why would
6 you attempt to get on a plane if the federal prosecutors called
7 up and said you're on a "no-fly" list. That just doesn't mean
8 somebody wouldn't try it but that's just making a convenient
9 decision.

10 Nor after staring at each other at this kind of stand
11 off after the attempt to drive into the FBI agent's car, they
12 stare and looked at each other. He doesn't get out and attack
13 the FBI agent at that point. Well, that's probably prudent, too.

14 One on one you attack an FBI agent you're probably
15 going to lose. So that's a common sense decision but that
16 doesn't -- I can't give a person too much credit for that; it
17 just shows they're not stupid, that's all.

18 So I believe the government's made its burden of
19 proof in this case and an order will issue. Defendant will be
20 ordered detained pending resolution of this matter.

21 MR. FRANK: Thank you.

22 MR. MUAWAD: Thank you, Judge.

23 (At 12:42 p.m., proceedings adjourned)

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CERTIFICATE

I, Patricia R. Pritchard, CER 3752, Certified Electronic Court Reporter for the State of Michigan, do hereby certify that the foregoing pages, 1 through 90, inclusive, comprise a full, true and correct transcript, to the best of my ability, of the proceedings and testimony recorded in the above-entitled cause.

September 13, 2012

Patricia R. Pritchard /S/
Patricia R. Pritchard, CER 3752